No. 15531

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G. Abramson and Howard Miller,

Appellants,

vs.

George Gardner, Trustee in Bankruptcy of the Estate of Feldman-Selje Corporation, Bankrupt,

Appellee.

Reply Brief of George Gardner as Trustee in Bankruptcy of the Estate of Feldman-Selje Corporation, Bankrupt, Appellee.

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Jurisdiction.

Appellee accepts as correctly stated the "Basis of Jurisdiction" as is set forth in Appellants' Opening Brief.

Statement of the Case.

Appellee accepts appellants' "Statement of the Case" as substantially correct, but as modified as follows:

Appellee does not concede that appellant Abramson's bid of $500.00 was the "best bid", but only concedes that it was the highest bid made at the purported sale.

The validity of the judgment and the purported sale in the State Court is a question to be decided on this appeal.

Appellee admits that as Receiver he sold the personal property involved in this proceeding at a public auction, at which public auction he received the sum of $6,817.61 for said personal property, and that he is holding said sum of $6,817.61 pending the disposition of this appeal, and that said sum of $6,817.61 is the "proceeds" from the sale of the personal property involved which appellants hope to receive by a reversal of the Order of the Referee and the affirmance of said Order by the District Court. (The fact that the Receiver had received $6,817.61 by the sale of said personal property was a fact that was known to the District Judge at the time of the hearing on the Petition for Review, because that fact was contained in a letter which was an exhibit attached to the Trustee's Brief of the facts and the Points and Authorities submitted to the District Court for its consideration, but that fact does not appear in the record of any of the papers before this Court on appeal, for which reason the foregoing explanation is being made of the reference to said sum of $6,817.61.)

The Questions Involved on Appeal.

In the opinion of appellee the questions involved in this appeal are as follows:

1. Is the purported sale to appellant Abramson "null and void" under Section 67a(1a) of the Bankruptcy Act because the purported judgment lien was obtained at a time when the judgment debtor was admittedly insolvent and as a consequence no valid sale could be held under a void judgment?

2. Assuming, but not admitting, that the purported sale was a valid sale, was appellant Abramson a "bonafide purchaser" within the exception to Section 67, Subdivision 3 of The Bankruptcy Act?

3. Is not the appellant Miller in exactly the same legal position as appellant Abramson?

4. Can there be a valid "sale" of personal property capable of physical delivery without the alleged purchaser taking immediate delivery and exercising continued dominion of ownership over said personal property?

Before presenting any law or argument sustaining Appellees' belief of the questions involved in this appeal, as hereinabove set forth, let us first attempt to dispose of each of the questions which the Appellants in their Opening Brief believe to be the points involved and which are to be decided and which points are as follows and are found on page 5 of Appellants' Opening Brief:

a. The first question is: "Did the Appellant Abramson acquire valid title and right to the possession of the personalty at the execution sale referred to? (It is conceded that the Appellant Miller stands in the same position as the Appellant Abramson insofar as title and the right to possession are concerned.)

The answer to the foregoing question in the opinion of counsel for the Appellee is a definite *"no"*, because Section 67 of The Bankruptcy Act, subdivision a(1) reads as follows:

> "Liens and Fraudulent Transfers.
>
> "a. (1) *Every lien* against the property of a person *obtained by attachment, judgment*, levy, or other legal or equitable process or proceedings *within four months* before the filing of a petition initiating a proceeding under this Act by or against such person *shall be deemed null and void* (a) *if at the time* when such lien was obtained *such person was insolvent*, etc." (The italics does not appear in the text but is used by counsel for emphasis.)

On August 24, 1956, the action resulting in the execution sale was filed and on the same day a writ of attachment was issued. On September 2, 1956, a judgment was obtained by default and on September 12, 1956, a writ of execution was issued, and the sale was thereafter had, and on October 1, 1956, the involuntary petition herein was filed, and on October 12, 1956, an adjudication was entered. From the foregoing sequence of events it would appear that approximately a month and three weeks passed before the date of the filing of the suit, the date of the attachment lien and the subsequent judgment being obtained, all well within the four months provided for by Section 67(a) (1) of the Bankruptcy Act.

As to whether or not the judgment debtor, the bankrupt herein, was insolvent, reference is made to the testimony of Stanley J. Fishman, the attorney for the attaching creditor, appearing at pages 39 and 40 of the Supplemental Transcript of Record reading as follows:

> "Q. Were you aware of the fact that the Bankrupt corporation had been negotiating with its creditors to try to get a settlement of the situation with them? A. With his creditors?
>
> Q. Yes. A. I was very much aware of it.
>
> Q. You were very much aware of it. You knew the financial condition of the Bankrupt, did you not? A. Yes.
>
> Q. *As a matter of fact, you knew that it was insolvent, didn't you?* A. *Yes.* Your Honor, I believe I can shorten these proceedings with Mr. Gardner's permission.
>
> The Referee: Go ahead.

The Witness: Out of the $500 that Mr. Miller paid for the assets I bought for $500 as a credit and sold for $500 in cash in turn, I agree to turn that $500 over to whomsoever the Court directs, reserving any right I may have to file a petition, *that the attachment was made for the benefit of all creditors,* and I should be allowed my costs. But I have the $500 and I will agree to return it.

Q. (By Mr. Gardner): As I understand your testimony, you do not now assert that you claimed any adverse interest to other creditors when you bought this. You were doing it for the benefit of all creditors? A. Not at this point. At this time my testimony is that I will turn the $500 over to whomsoever the Court directs without contesting any preference action, to save you the trouble of bringing a preference action. That is all my testimony is for.

Q. *You were aware of the insolvent condition of the Bankrupt, weren't you?* A. *Yes.*

Q. *At the time you bought this in?* A. *Yes.*

Q. Howard Miller bought from you, didn't he? A. Yes.

Mr. Gardner: You may cross-examine." (The italics does not appear in the text but is used by counsel for emphasis.)

On page 19 of Appellants' Opening Brief counsel for the Appellants admits

"That the purchasing creditor (the appellant Abramson) had knowledge of the insolvent condition of the bankrupt concern at the time the execution sale was made. *This fact is not denied* and was readily admitted at the hearing held on the Receiver's position." (The italics does not appear in the text but is used by counsel for emphasis.)

In the Findings of Fact prepared in this matter and found on page 23 of the Transcript of the Record, the Court among other things found as follows:

> "That at the time the Respondent G. Abramson caused the Attachment to be levied, and at all times thereafter, *the bankrupt was wholly insolvent,* and that the said Respondent G. Abramson *not only had reasonable cause to believe, but had actual knowledge of said fact;* and that the said Respondent G. Abramson knew when she attempted to purchase the said property at said execution sale by giving a credit of $500.00 on her judgment, that she was obtaining a preference over other creditors of the same class, and knew that in the event of bankruptcy within four months of such attempted preferential purchase, she would be required to surrender the said preference; *and that therefore, she was not a bona fide purchaser at said judicial sale,* but was attempting to obtain a preference over other creditors of the same class.
>
> "That the purported sale by the Respondent G. Abramson to the Respondent Howard Miller, *was a private sale and not a judicial sale;* and that the $500.00 paid by Respondent Howard Miller was not the fair equivalent value of said property; and that the title obtained by said Howard Miller is valid only to the extent of the $500.00 which he paid; and that upon the return to him of said $500.00, he has no further right, title or interest in or to any of the property in controversy." (The italics does not appear in the text but is used by counsel for emphasis.)

It would seem that from all of the above, the Appellants' question number 1, which is referred to as question a herein, has been fully answered, and that the only answer to that question is "no" for all of the reasons

and by reason of all of the testimony and the facts as hereinabove set forth.

b. The second question is:

> "Having secured title at an execution sale can the Appellants' title be invalidated by a subsequently appointed Receiver or Trustee in bankruptcy under Section 67 of The Bankruptcy Act when the petition in bankruptcy was filed several weeks *after* such sale?"

The answer to the foregoing question, in the opinion of the Appellee, is "yes" for each of the same reasons as set forth above in the answer to question 1 (herein referred to as question a) and also because it is apparent from the answer to question a above that the Appellant Abramson did not acquire any valid title.

c. The third question is: "Isn't the subsequently appointed Trustee in Bankruptcy limited to the recovery of a preference under Section 60 of The Bankruptcy Act?"

The answer to this question might have been "yes" if the personal property which is the subject matter of the litigation and of this appeal had been moved from the possession of the bankrupt and placed beyond the reach of the summary process of the Bankruptcy Court, but the fact is that the personal property was never moved from the possession and the premises of the bankrupt and at all times was in the possession of the bankrupt and was found there by the Receiver.

On page 22 of the Transcript of Record the Referee who heard this matter made the following Finding of Fact with reference to the foregoing:

> *"That the property in controversy was never removed from the premises of the bankrupt*, and that

on or about October 1st, 1956, an Involuntary Petition in Bankruptcy was filed against the bankrupt and said bankrupt was adjudicated on or about October 10th, 1956, and when the Receiver took possession of the premises of the said bankrupt, *the property in controversy was still there, and the Receiver took possession thereof, and is now in possession.*" (The italics does not appear in the text but is used by counsel for emphasis.)

For all of the foregoing reasons it is the opinion of counsel for the Appellee that the answer to the foregoing question number 3 (herein referred to as c) is no.

d. The fourth question is:

"Conceding that the purchaser at the execution sale is also the judgment creditor, should such judgment creditor occupy a different status than any other bidder or purchaser?"

The answer to the foregoing question must be "yes", not only because of the judgment creditor's knowledge of insolvency as hereinabove already noted in answer to question number 1 (herein referred to as a above), but also because plaintiff in fact was not the real party in interest and was not the real judgment creditor, but a secretary in the office of attorney Fishman, as appears from the foregoing questions and answers at pages 36 and 37 of the Supplemental Transcript of Record as follows:

"Q. Mr. Fishman, you are attorney for G. Abramson? A. That is correct.

Q. Who is G. Abramson? Is he someone in your office? A. That is correct. She is the secretary in the office."

Therefore, the knowledge of attorney Fishman was in fact the knowledge of his secretary, G. Abramson, the plaintiff in the law suit, and attorney Fishman knew of the defendant's insolvency as is amply evident from the admissions of counsel for the Appellants (App. Op. Br. p. 19) and as is amply evident from Fishman's testimony at pages 39 and 40 of the Supplemental Transcript of Record, which is hereinabove quoted in full in answer to question number 1 (referred to herein as a) and is also evident from the Findings of Fact hereinabove referred to and found on page 23 of the Transcript of Record.

e. The fifth question is: "Are the Appellants entitled to the fund in possession of the Appellee or is the bankrupt estate the owner?"

If the answers to the first four questions as hereinabove set forth to Appellants' first four questions are correct in the light of the facts in this case and the law as applied to those facts, then the answer is that the Trustee in Bankruptcy of the bankrupt estate is entitled to the funds in controversy and not the appellants.

Having disposed of each of the Appellants' questions in the manner hereinabove set forth, let us now proceed to inform the Court on the questions which the Appellee believes are involved in this appeal and which questions stated in sequence are as follows:

POINT I.

Is the Purported Sale to Appellant Abramson "Null and Void" Under Section 67a(1) of the Bankruptcy Act Because the Purported Judgment Lien Was Obtained at a Time When the Judgment Debtor Was Admittedly Insolvent and as a Consequence No Valid Sale Could Be Held Under a Void Judgment?

It would seem that the reading of Section 67a (1) of the Bankruptcy Act answers the question in the affirmative, and the Court must conclude that the purported sale was "null and void" because all of the facts clearly fit in to said Section 67a (1) as follows: First we have an attachment lien followed by a judgment lien. Both liens were obtained within the four months prior to the filing of the petition. It is apparent that both the attachment lien and the judgment lien were obtained while the defendant in the State Court action, the bankrupt herein, was insolvent. This is all amply apparent and abundant from the factual statement of the case by counsel for the Appellants by the testimony of the witness Fishman, by the admissions by counsel for the Appellants and from the Findings of Fact in this matter, all of which have been hereinabove amply referred to and pinpointed as to their location in the Transcript of Record, the Supplemental Transcript of Record and the Appellants' Opening Brief.

It is not deemed necessary to burden the Court with cases on the point when the factual situation fits in so fully, clearly and definitely with the section entitled "Liens And Fraudulent Transfers" referred to herein as Section 67a (1) of The Bankruptcy Act, which Section itself uses the words "null and void" if the factual situation comes within the prohibitions of said Section.

POINT II.

Assuming, but Not Admitting That the Purported Sale Was a Valid Sale, Was Appellant a "Bona Fide Purchaser" Within the Exception to Section 67, Subdivision 3 of the Bankruptcy Act?

The answer to the foregoing question is in the negative because of the knowledge of insolvency on the part of Abramson as admitted by the attorney for the appellants and as also admitted by the attorney for G. Abramson in his testimony quoted hereinabove.

Further, because the original attachment, as appears from the testimony of attorney Fishman for the plaintiff and which is found at page 39 of the Supplemental Transcript of Record, was to the effect "that the attachment was made for the benefit of all creditors."

Further, by reason of the fact that the Court found after hearing the testimony and as set forth on page 23 of the Transcript of Record, "that therefore, she was not a bona fide purchaser at said judicial sale, but was attempting to obtain a preference over other creditors of the same class."

Further, because of the fact that the Court found [page 21 of the Transcript of Record]

> "That the property involved in this controversy is of the value of $1,700.00, as found by the Court Appraiser; and that the sum of $500.00 is not a fair consideration for the property involved in this controversy."

In addition to the foregoing, the following Points and Authorities are submitted for this Court's consideration in determining whether or not the Appellants are "bona fide purchasers at a judicial sale."

In Black's Law Dictionary, Third Edition, page 234, a bona fide purchaser is described as follows:

"A purchaser for a valuable consideration paid or parted with in the belief that the vendor had a right to sell, and without any suspicious circumstances to put him on inquiry."

Merritt v. Railroad Co., 12 Barb (N. Y) 605.

"One who acts without covin, fraud, or collusion; one who, in the commission or connivance that no fraud, pays full price for the property, and in good faith, honestly, and in fair dealing *buys and goes into possession."* (The italics above does not appear in the text of the opinion but is used by counsel for emphasis.)

Sanders v. McAfee, 42 Ga. 250.

"A bonafide purchaser is one who buys property of another without notice that some third person has a right to, or interest in, such property, *and pays a full and fair price for the same* at the time of such purchase, or before he has notice of the claim or interest of such other in the property." (The italics above does not appear in the text of the opinion but is used by counsel for emphasis.)

Spicer v. Waters, 65 Barb. (N. Y.) 231 and many other cases.

There are a number of cases cited in 11 U. S. C. A. at page 472, Note 257, which are cases cited under Sec-

tion 67a (3) of "The Bankruptcy Act", and some of the cases are as follows:

"A purchaser is not in good faith who makes no effort to determine whether one may make a transfer which will not be in violation of this section." (The section referred to above being Section 67a (3).)

Lumpkin v. Foley, 204 Fed. 372.

"A person is not to be considered a bonafide purchaser, who, in addition to knowledge of suspicious circumstances, is aware that he is purchasing a large and valuable amount of property at a grossly inadequate consideration."

In re Goldberg, 121 Fed. 578.

"Surrounding circumstances, leading an ordinarily prudent businessman to conclude that execution debtor is insolvent, will deprive purchaser at execution sale of status of bonafide purchaser."

Dreyer v. Klicklighter, 228 Fed. 774.

It would appear from all of the foregoing that the answer to question number 2 raised by the Appellee must be a negative answer and that the Appellate Abramson was not a bona fide purchaser" within the exception to Section 67, subdivision 3 of The Bankruptcy Act.

POINT III.

Is Not the Appellant Miller in Exactly the Same Legal Position as Appellant Abramson?

It would appear that the answer to the foregoing question is not difficult, and in fact it is admitted by the counsel for the Appellants on page 5 of Appellants' Opening Brief.

> "That the Appellant Miller stands in the same position as the Appellant Abramson insofar as title and right to possession are concerned."

If the foregoing were not sufficient to settle this question counsel for the Appellee is certain that the following citation of law would dispose of the position of the Appellant Miller.

> "The seller of property can transfer to the buyer no better title than he has himself, and if at the time of the transfer he had no title, the purchaser, although buying in good faith and for full value, obtains no title."
>
> *Pop v. Exchange Bank,* 189 Cal. p. 296.

And to the same effect the case of *Siebenhauer v. Bank of of California,* 211 Cal. at page 239.

It would therefore follow that if the sale is void for all of the reasons hereinabove indicated as against the Appellant Abramson, that it is equally void as to the Appellant Miller, because he is in exactly the same legal situation as is the Appellant Abramson.

POINT IV.

Can There Be a "Valid Sale" of Personal Property Capable of Physical Delivery Without the Alleged Purchaser Taking Delivery and Exercising Dominion of Ownership Over Said Personal Property?

The answer to this question must be in the negative. That the personal property alleged to have been purchased was never moved out of the premises of the bankrupt and was found there by the Receiver at the time of his appointment cannot be disputed, as such is the finding of the Referee, affirmed by the District Court, as is hereinabove amply set forth and referred to.

Section 3440 of the Civil Code of the State of California provides that

> "*Every transfer of personal property* made by a person having at the time the possession or control of the property and *not accompanied by an immediate delivery followed by an actual and continued change of possession* of the thing transferred, *is conclusively presumed fraudulent and void as against the transferor's creditors while he remains in possession,* etc., etc." (The italics does not appear in the text but is used by counsel for emphasis.)

There are many cases on the subject, and while it is not intended to burden the Court with too many of them, it is well to point out some of the following:

> "Good faith and adequate consideration for transfer of personalty are immaterial and constitute no defense to action to set aside transfer for fraud on transferor's creditor, in absence of change in possession of personalty."
>
> *Hepner v. Hepner,* 32 Cal. App. 2d 582.

"A transfer of personal property, unaccompanied by a corresponding change of possession, is fraudulent per se, and void as to creditors."

Chenery v. Palmer, 6 Cal. 119, and many other decisions cited in this case to the same effect.

"Transfer of title by buyer to bank paying price without delivery and change of possession, is void as against buyer's creditors, if title passed from sellers to buyer."

Mohr v. First National Bank, 69 Cal. App. 756.

"Recordation of bill of sale of personal property without immediate delivery was no defense as against execution creditor."

Edgerton v. Scammon, 119 Cal. App. 273.

"Where there was no delivery or change of possession of grain conveyed by a bill of sale, the right of an officer who attached it under a writ in an action against the vendor was superior to that of the purchaser."

Crocker v. Cunningham, 122 Cal. 547.

"The fact that the purchaser of personal property at sheriff's sale permits it to remain in the possession of the judgment debtor after the sale, and allows him to exercise acts of ownership over it, is some evidence that the sale was fraudulent as to the creditors of the judgment debtor."

O'Brien v. Chamberlain, 50 Cal. 285.

Argument and Conclusion.

It follows from the statement of facts and the law applicable to the facts that the Appellants in this matter do not come within the exception of Section 67a (3) of "The Bankruptcy Act" and that they are not "bona fide purchasers at a judicial sale", and that the purported lien of the judgment under which the purported sale took place was a judgment lien that was "null and void" under Section 67a, (1) of The Bankruptcy Act, because at the time when the judgment lien was obtained the judgment debtor was insolvent and was admittedly known to be insolvent and was found to be insolvent in the Findings of Fact resulting from the trial of the action before the Referee, and that the purported execution sale was null and void and conclusively presumed to be fraudulent by reason of the violation of Section 3440 of the Civil Code of the State of California in that the sale of the personal property was not accompanied by an immediate delivery and by an actual and continued change of possession of the things transferred, for all of which reasons it is respectfully urged that the judgment of the Referee and judgment of the District Court be affirmed.

Respectfully submitted,

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Attorney for Trustee, Appellee.